

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CORNELIUS McDANIEL,

Petitioner,

Case No. 1:06-cv-125

v

HON. JANET T. NEFF

KEN MCKEE,

Respondent.

OPINION

This is a habeas corpus petition filed pursuant to 28 U.S.C. § 2254. The matter was referred to the Magistrate Judge, who issued a Report and Recommendation, recommending that this Court deny the petition for the following reasons: (1) Petitioner's claim that the trial court committed reversible error when it refused to instruct the jury on the lesser offense of voluntary manslaughter did not violate due process of law; and (2) Petitioner's claim that the trial court based the sentence upon inaccurate information did not violate due process of law. The matter is presently before the Court on Petitioner's objections to the Report and Recommendation. In accordance with 28 U.S.C. § 636(b)(1) and FED. R. CIV. P. 72(b)(3), the Court has performed de novo consideration of those portions of the Report and Recommendation to which objections have been made. The Court denies the objections and issues this Opinion and Final Order pursuant to FED. R. CIV. P. 58.

Petitioner objects to the Magistrate Judge's analysis and conclusion that the refusal to instruct the jury on the lesser charge of voluntary manslaughter did not violate Petitioner's right to due process of law.

Petitioner “continues to maintain that the state court’s adjudication of this claim is unsupportable, arbitrary, and so manifestly and flagrantly violates clearly stated law so as to require reversal” (Obj. at 1). Petitioner acknowledges that the failure to instruct on lesser included offenses in a non-capital case is reviewable in a habeas corpus action only if the failure results in a miscarriage of justice or constitutes an omission inconsistent with the rudimentary demands of fair procedure (Obj. at 1, 4). Petitioner attempts to apply *People v. Roeder*, 262 N.W.2d 872 (Mich. 1997) (holding that the trial court must instruct when there is evidence, however slight, that would support a manslaughter conviction). Petitioner claims that the trial court’s refusal to give the instruction in this case was based on “individual preference” (Obj. at 5).

Petitioner’s argument is without merit. The Magistrate Judge properly concluded that the failure to instruct on the lesser included offense did not amount to a miscarriage of justice and therefore the claim is not a basis for habeas relief (Report and Recommendation at 22-23). Both the state trial court and appellate court held as a matter of law that the evidence did not support an instruction for voluntary manslaughter in Petitioner’s case. The Sixth Circuit has stated that because it is not the function of a federal habeas court to correct errors in state law, intervening to set aside a conviction would not be warranted except under the most unusual circumstances. *Bagby v. Sowders*, 894 F.2d 792, 795 (6th Cir. 1990) (en banc). Petitioner provides no basis from which to conclude that the Magistrate Judge was incorrect in rejecting his claim as a basis for habeas relief. The objection is therefore denied.

Having determined to approve and adopt the Magistrate Judge’s Report and Recommendation as this Court’s opinion, the Court must further determine pursuant to 28 U.S.C. § 2253(c) whether to grant a certificate of appealability as to the issues raised. The Court must

review the issues individually. *Slack v. McDaniel*, 529 U.S. 473 (2000); *Murphy v. Ohio*, 263 F.3d 466, 466-67 (6th Cir. 2001).

“Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack*, 529 U.S. at 484.

Upon review of Petitioner’s claims concerning the jury instructions and scoring of his sentencing guidelines, this Court finds that reasonable jurists would not find the Court’s assessment of petitioner’s claims debatable or wrong. A certificate of appealability will therefore be denied.

A Final Order will be entered consistent with this Opinion.

Date: June 11, 2009

/s/ Janet T. Neff
JANET T. NEFF
United States District Judge

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FINAL ORDER

In accordance with the Opinion entered this date:

IT IS HEREBY ORDERED that the objections (Dkt 38) are DENIED and the Report and Recommendation of the Magistrate Judge (Dkt 37) is APPROVED and ADOPTED as the opinion of the Court.

IT IS FURTHER ORDERED that the petition for habeas corpus relief (Dkt 1) is DENIED for the reasons stated in the Report and Recommendation.

IT IS FURTHER ORDERED that a certificate of appealability pursuant to 28 U.S.C. § 2253(c) is DENIED as to each issue asserted.

Date: June 11, 2009

/s/ Janet T. Neff
JANET T. NEFF
United States District Judge